

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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74-2260

In The

United States Court of Appeals

For The Second Circuit

NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., et al,

Plaintiffs-Appellees,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF
NEW YORK, et al,

Defendants-Appellees,

PHARMACEUTICAL SOCIETY OF THE STATE OF NEW
YORK, INC., MOE GARTNER, LAWRENCE BLANK and
VINCENT J. MORENO,

Applicants for Intervention-Appellants.

APPENDIX

DAVID GOLDBERG

*Attorney for Applicants for Intervention
Appellants*

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TABLE OF CONTENTS

Appendix

	Page
Chronological List of Relevant Docket Entries	1a
Summons	2a
Complaint	4a
Answer	9a
Notice of Motion	14a
Motion for Leave to Intervene	15a
Intervenor's Answer	17a
Affidavit of Sal J. Rubino in Support of Motion to Intervene	22a
Affidavit of Moe Gartner in Support of Motion to Intervene	24a
Affidavit of Vincent J. Moreno in Support of Motion to Intervene	27a
Affidavit of Lawrence Blank in Support of Motion to Intervene	30a
Plaintiffs' Response to Motion for Inter- vention	32a

Contents

	Page
Plaintiffs' Memorandum in Opposition to Motion to Intervene	33a
Defendants' Response to Motion for Inter- vention	43a
Transcript of Proceedings Before Hon. Edmund Port, J. Held on June 24, 1974 . .	45a
Order	62a
Notice of Appeal	64a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES
APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK PUBLIC INTEREST RESEARCH
GROUP, INC., et al,

Plaintiffs-Appellees,

v.

THE REGENTS OF THE UNIVERSITY OF
THE STATE OF NEW YORK, et al,

Defendants-Appellees,

PHARMACEUTICAL SOCIETY OF THE STATE
OF NEW YORK, INC., MOE GARTNER, LAWRENCE
BLANK and VINCENT J. MORENO,

Applicants for Intervention-
Appellants

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES.

4/18/74	Complaint
4/23/74	Summons
5/13/74	Answer
6/10/74	Motion For Leave To Intervene
6/18/74	Affidavits In Support of Motion To Intervene
6/18/74	Plaintiffs Response To Motion For Intervention (Including Plaintiffs' Memorandum In Opposition To Motion To Intervene)
6/18/74	Defendants' Response To Motion For Intervention
8/2/84	Order
8/27/74	Notice of Appeal Transcript

2a

SUMMONS

*Filed
4/22/74
LW*

SUMMONS IN A CIVIL ACTION

CIV. 1 (2-64)
(Formerly D. C. Form No. 45 Rev. (6-69))

United States District Court

FOR THE

NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 74-CV-166

NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., ROSEMARY POOLER, BARBARA KRAMER,
and MARILYN ONDRASIK,

Plaintiff s

SUMMONS

v.
THE REGENTS OF THE UNIVERSITY OF THE STATE OF
NEW YORK AND JOSEPH W. MC GOVERN, THEODORE
M. BLACK, ALEXANDER J. ALLAN, CARL H. PFORZHEIMER,
JR., EDWARD M.M. WARBURG, JOSEPH T. KING, JOSEPH
C. INDELICATO, M.D., MRS. HELEN B. POWER, FRANCIS
W. MC GINLEY, KENNETH B. CLARK, HAROLD E. NEWCOMB,
WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE
S. KLEIN, and WILLIAM JOVANOVICH, as Members of
Regents of University of State of New York,
Defendant s

To the above named Defendant s:

You are hereby summoned and required to serve upon Dennis A. Kaufman, Esq.

plaintiff's attorney , whose address is 29 Elk Street, Albany, New York 12207

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

(L.S.)

Date: Utica, New York
 April 18, 1974

J.R. SCULLY

Clerk of Court.

E. H. C. 200

Deputy Clerk.

[Seal of Court]

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

4a

COMPLAINT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., ROSEMARY POOLER, BARBARA KRAMER, and
MARILYN ONDRASIK

Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF THE STATE
OF NEW YORK AND JOSEPH W. MCGOVERN, THEODORE M.
BLACK, ALEXANDER J. ALLAN, CARL H. PFORZHEIMER,
JR., EDWARD M. M. WARBURG, JOSEPH T. KING,
JOSEPH C. INDICATO, M.D., MRS. HELEN B.
POWER, FRANCIS W. MCGINLEY, KENNETH B. CLARK,
HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN
I. GRIFFITH, GENEVIEVE S. KLEIN, and WILLIAM
JOVANOVIH, as Members of Regents of University
of State of New York

Defendants.

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED *copy*

APR 18 1974

AT O'CLOCK M.
J. R. SCULLY, Clerk
UTICA

CIVIL ACTION NO.

74 CV - 166

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action pursuant to 42 U.S.C. § 1983 seeking to convene a three-judge court to enjoin defendants from enforcing the provisions of 8 N.Y.C.R.R. § 63.3 (1972) (New York Code of Rules and Regulations) which prohibits the advertising of fixed fees or prices for professional services of pharmacists, those professional services being the preparing, compounding, preserving or dispensing of drugs, medicines and therapeutic devices on the basis of prescriptions or other legal authority, and to have the same declared unconstitutional.

2. The value of the amount in controversy exceeds \$10,000.

3. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3).

4. Plaintiff New York Public Interest Research Group, Inc. (NYPIRG) is a non-profit, nonpartisan research and advocacy organization incorporated under the laws of the State of New York, with a membership of approximately 60,000, many of whom are users of prescription drugs. Among its activities are the promotion and protection of the rights and welfare of its members and all consumers throughout New York State.

5. Plaintiff Rosemary Pooler is a resident of the State of New York. She regularly purchases prescription drugs for use by her children.

6. Plaintiff Barbara Kramer is a resident of the State of New York and a member of NYPIRG. She suffers from certain allergies which require her to take prescription drugs on a regular basis.

7. Plaintiff Marilyn Ondrasik is a resident of the State of New York and a member of NYPIRG. She suffers from certain allergies which require her to take prescription drugs on a regular basis.

8. Defendant Regents of the University of the State of New York (Board of Regents) is charged by New York Education Law, § 6509 with regulating professional conduct in the State of New York.

9. Defendants Joseph W. McGovern, Theodore M. Black, Alexander J. Allan, Carl H. Pforzheimer, Jr., Edward M. M. Warburg, Joseph T. King, Joseph C. Indelicato, M.D., Mrs. Helen B. Power, Francis W.

McGinley, Kenneth B. Clark, Harold E. Newcomb, Willard A. Genrich, Emllyn I. Griffith, Genevieve S. Klein, and William Jovanovich are the members of the Board of Regents.

10. New York law provides in relevant part:

A. Education Law, § 6509: "Each of the following is professional misconduct, and any licensee found guilty of such misconduct under the procedures prescribed in section sixty-five hundred ten shall be subject to the penalties prescribed in section sixty-five hundred eleven:

(9) Committing unprofessional conduct, as defined by the board of regents in its rules or by the commissioner in regulations approved by the board of regents."

B. 8 N.Y.C.R.R. § 63.3:

"Unprofessional conduct in the practice of pharmacy. . . shall include but shall not be limited to the following:

(c) advertising of fixed fees or prices for professional services or the use of words 'cut rate', 'discount' or other words having a similar connotation in connection with the offering of professional services by a pharmacist, the owner of a pharmacy or by a person, group or organization in behalf of and with the permission of a pharmacist or the owner of a pharmacy. . . ."

11. As a result of Education Law, § 6509 and 8 N.Y.C.R.R. § 63.3 there is in the State of New York no advertising of the prices of prescription drugs.

12. Because of the prohibition of advertising of the prices of professional services imposed by Education Law, § 6509 and 8 N.Y.C.R.R. § 63.3, plaintiffs Pooler, Kramer, Ondrasik and members of plaintiff NYPIRG are economically harmed:

- A. by being deprived of information as to where the least expensive prescription drugs might be purchased; and
- B. by having to pay higher prices for prescription drugs than they would have to pay if the advertising of prescription drug prices were permitted.

13. The prohibition of advertising the prices of professional services imposed by Education Law, § 6509 and 8 N.Y.C.R.R. § 63.3 and enforced by defendants deprives plaintiffs Pooler, Kramer, Ondrasik and members of plaintiff NYPIRG of their right to receive vital information in violation of the First Amendment of the United States Constitution and 42 U.S.C. § 1983.

14. The prohibition of the advertising of the price of professional services imposed by said sections and enforced by the defendants bears no reasonable relationship to the health, safety and welfare of the citizens of New York, but rather serves only to maintain unnecessarily inflated prices for prescription drugs and to deprive plaintiffs Pooler, Kramer, Ondrasik and members of plaintiff NYPIRG and others of vital information, thus violating the due process provisions of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

WHEREFORE, plaintiffs pray for an order

- (1) convening a three-judge court pursuant to 28 U.S.C. § 2284;

8a

(2) declaring that 8 N.Y.C.R.R. § 63.3 is unconstitutional in violation of the First and Fourteenth Amendments of the United States Constitution;

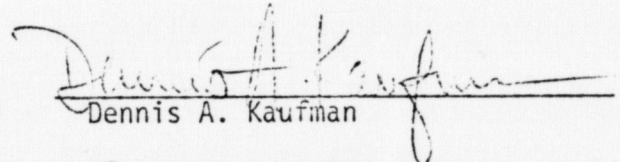
(3) declaring that Education Law § 6509 and 8 N.Y.C.R.R. § 63.3 violate 42 U.S.C. § 1983;

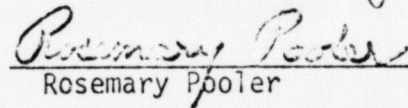
(4) enjoining defendants from enforcing the provisions of 8 N.Y.C.R.R. § 63.3 which prohibit the advertising of fixed fees or prices of professional services of pharmacists;

(5) granting plaintiffs such other and further relief as may be just and proper; and

(6) awarding plaintiffs their costs and disbursements in this action.

DATE: Albany, New York
April 17, 1974


Dennis A. Kaufman


Rosemary Pooler

29 Elk Street
Albany, New York 12207
(518) 436-0876

9a

ANSWER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., ET AL.,

Plaintiffs,

-against-

THE REGENTS OF THE UNIVERSITY OF THE STATE
OF NEW YORK ET AL.,

Defendants.

:
:
:
:
:
:
:
ANSWER

: CIVIL ACTION NO.
74-CV-166

FIRST DEFENSE

1. The Court lacks jurisdiction over the subject matter.

SECOND DEFENSE

2. The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

3. Admits each and every allegation contained in paragraphs numbered 1, 8, 9 and 11 thereof, upon information and belief; admits each and every allegation contained in paragraphs numbered 4, 5, 6, and 7 thereof, and denies each and every allegation contained in paragraphs numbered 2, 3, 12, 13 and 14 thereof.

4. Admits the accuracy of the excerpts from Education Law Section 6509 and Section 63.3 of the Regulations of the Commissioner of Education as set forth in paragraph 10 thereof, but alleges that the quotation from said regulation is incomplete, and that the complete relevant quotation therefrom is set forth in paragraph 5 herein.

5. Denies that the prohibition against price advertising in Section 63.3 prevents plaintiffs from obtaining price information, and alleges that pharmacists have an affirmative duty to make price information available under the provisions of Section 6826 of the Education Law of the State of New York (Laws of 1973 Chapter 751) and under the provisions of Section 63.3 of the Regulations of the Commissioner of Education, subdivisions (c) and (m) thereof. Said statute and regulations read as follows:

"Education Law Section 6826

Posting 1. Every pharmacy shall post a list of drugs together with their current selling price in the manner prescribed by this section.

2. Such list shall be prepared from time to time by the board and distributed to each pharmacy in the state. The list shall be a compendium of the one hundred fifty most frequently prescribed drugs together with their usual dosages for which a prescription is required by the provisions of the 'Federal Food, Drug, and Cosmetic Act' (21 U.S.C. 301, et seq.; 52 Stat. 1040, et seq.), as amended, or by the commissioner of health.

3. The board shall provide appropriate space on the list for inclusion by a pharmacy of its current selling price for each listed drug and dosage. The current selling price means the actual price to be paid by a retail purchaser to the pharmacy for any listed drug at the listed dosage.

4. The list shall be conspicuously posted at or adjacent to the place in the pharmacy where prescriptions are presented for compounding and dispensing.

5. Nothing contained herein shall prevent a pharmacy from changing the current selling price at any time, provided that the listed price is simultaneously adjusted to reflect the new current selling price."

"Regulations of the Commissioner of
Education

Section 63.3 Unprofessional Conduct. Unprofessional conduct in the practice of pharmacy within the meaning of section 6804 of the Education Law shall include but shall not be limited to the following:

* * * *

(c) advertising of fixed fees or prices for professional services or the use of the words 'cut rate', 'discount' or other words having a similar connotation in connection with the offering of professional services by a pharmacist, the owner of a pharmacy or by any other person, group or organization in behalf of

and with the permission of a pharmacist or the owner of a pharmacy, provided, however, that proper actions taken in meeting the requirements of subdivision (m) shall not be construed as constituting advertising;

* * * *

(m) failure to make prescription fee or price information readily available by:

(1) providing such information upon request and upon the presentation of a prescription for pricing or dispensing; or,

(2) offering to provide such information by posting a sign measuring 9 inches by 12 inches in the window or within the pharmacy at the area where prescriptions are normally received or, in the case of pharmacies located in general merchandising establishments at the registered area reading:

'The price for which your prescription will be dispensed will be provided upon request and upon presentation of such prescription for pricing or dispensing.' The sign must in every case be clearly visible to the patrons to be served. "

FOURTH DEFENSE

6. The law and regulations governing the practice of pharmacy in the State of New York provide fair and adequate means whereby consumers can ascertain the prices of prescription drugs, while prohibiting false and fraudulent advertising, bait advertising, and other commercial advertising of prescription drugs by pharmacists.

WHEREFORE, defendants demand:

- (1) That the complaint be dismissed;
- (2) Such other and further relief as to the Court may seem just and proper.

Dated: May 10, 1974

ROBERT D. STONE, Esq.
Attorney for Defendants

Donald O. Meserve
of Counsel
State Education Department
Washington Avenue
Albany, New York 12224
(518) 474-8869

NOTICE OF MOTION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., ET AL.,

Plaintiffs

against

THE REGENTS OF THE UNIVERSITY OF THE
STATE OF NEW YORK, ET AL.,

Defendants


PHARMACEUTICAL SOCIETY OF THE STATE OF
NEW YORK, INC. MOE GARTNER, LAWRENCE
BLANK and VINCENT J. MORENO

Applicants for
Intervention

TO:

DENNIS A. KAUFMAN, ESQ.
Attorney for Plaintiffs
and
ROBERT D. STONE, ESQ.
DONALD O. MESERVE, ESQ., Of Counsel
Attorney for Defendants

PLEASE TAKE NOTICE that the undersigned will bring
the above motion for leave to intervene on for hearing before
this court at the Federal Building, City of Utica, State of
New York, on the 20th day of June, 1974, at 10:00 o'clock in
the forenoon of that day, or as soon thereafter as counsel can
be heard.


DAVID GOLDBERG
Attorney for Applicants for
Intervention
999 Central Avenue
Woodmere, New York 11598

Louis S. Petrone
Attorney for Service of paper
upon Applicants for Intervention
106 Memorial Parkway
Utica, New York 13501

MOTION FOR LEAVE TO INTERVENE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., ET AL.,

Plaintiffs,

against

THE REGENTS OF THE UNIVERSITY OF THE STATE
OF NEW YORK, ET AL.,

Defendants

PHARMACEUTICAL SOCIETY OF THE STATE OF
NEW YORK, INC., MOE GARTNER, LAWRENCE
BLANK and VINCENT J. MORENO

Applicants for
Intervention

MOTION TO
INTERVENE AS
A DEFENDANT.

CIVIL ACTION NO.
74-CV-166

The PHARMACEUTICAL SOCIETY OF THE STATE OF NEW YORK, INC., MOE GARTNER, LAWRENCE BLANK and VINCENT J. MORENO, move for leave to intervene as defendants in this action, in order to assert the defenses set forth in their proposed answer, of which a copy is attached hereto.

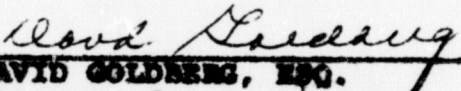
Applicants support such motion on the ground that they represent, or are personally, pharmacists licensed to practice and practicing their profession in the State of New York, as well as maintaining their livelihood thereby, and as such claim both professional and economic interests in the subject of the present action; that they have a defense to plaintiffs' claim presenting both questions of law and fact which are common to the main action; that they are so situated that the disposition of the action will or may as a practical matter impair or impede their ability to protect or maintain these interests; and that the applicants' interest cannot be adequately represented by existing parties, the applicants

having both different and additional defenses to assert as specifically and particularly set forth in the attached proposed Answer, as well as a different motivation to defend than do the present defendants.

The rights of the plaintiffs and the defendants will in no way be prejudiced by the intervention of the Applicants in this matter.

In further support of the motion, reference is made to Rule 24 of the Federal Rules of Civil Procedure as amended in 1966.

Dated: June 6th, 1974.


DAVID GOLDBERG, ESQ.
Attorney for Applicants
for Intervention
999 Central Avenue
Woodmere, New York 11598

Louis S. Petrone
Attorney for Service of
papers upon Applicants for
Intervention
106 Memorial Parkway
Utica, New York 13501

INTERVENOR'S ANSWER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., ET AL.,

Plaintiffs

INTERVENORS' ANSWER

-against-

THE REGENTS OF THE UNIVERSITY OF THE STATE
OF NEW YORK, ET AL

CIVIL ACTION
NO. 74-CV-166

Defendants

PHARMACEUTICAL SOCIETY OF THE STATE OF
NEW YORK, INC., MOE GARTNER, LAWRENCE
BLANK and VINCENT J. MORENO

Applicants for
Intervention

NOW COMES THE INTERVENORS and answer the plaintiffs'
Bill of Complaint as follows:

FIRST DEFENSE

1. The Court lacks jurisdiction over the subject matter.
2. Intervenor deny the applicability of 42 U.S.C. 1983 to the present cause, and, therefore, further deny the applicability of 28 U.S.C. § 2281, as alleged in paragraph 1 of the Complaint.
3. Intervenor are without knowledge or information sufficient to form a belief as to what amount, if any, is involved in this action and they leave plaintiffs to their proof of the allegation that a sum in excess of Ten thousand (\$10,000.00) Dollars is involved as to each and every plaintiff.

4. Intervenor deny that the Court has jurisdiction under 28 U.S.C. § 1343 (3) as alleged in paragraph 3 of the Complaint.

5. Intervenor deny that the Court has jurisdiction under 28 U.S.C. § 1331 as alleged in paragraph 3 of the Complaint.

6. Intervenor deny that this action arises under the Constitution or laws of the United States and deny that there has been any threatened deprivation, under color of any statute of the State of New York, of any rights, privileges or immunities secured to the plaintiffs by the Constitution or laws of the United States.

SECOND DEFENSE

7. The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

8. This action is not maintainable as a class action.

9. Plaintiff, New York Public Interest Research Group, Inc., does not have standing to bring this action.

FOURTH DEFENSE

10. Intervenor are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4, 5, 6, and 7 of the Complaint, and leave plaintiffs to their proof of such allegations, and intervenors admit each and every allegation contained in paragraph 9 thereof. Intervenor deny paragraph 8 of the Complaint, but admit that NEW YORK EDUCATION LAW § 6506 authorizes the Board

of Regents to regulate professional conduct in the State of New York.

FIFTH DEFENSE

11. Intervenorers admit the accuracy of the excerpts from § 6509 of the Education Law and § 63.3 of the regulations of the Commissioner of Education as set forth in paragraph 10 of the Complaint, but deny that paragraph 10 therein fully sets forth New York Law in relevant part, and further allege that the omission of sub-section (m) of § N.Y.C.R.R. § 63.3 (New York Code of Rules and Regulations), the regulations of the Commissioner of Education, effective June 1, 1972, provide an inaccurate description of the current laws of New York State.

SIXTH DEFENSE

12. Intervenorers deny the allegations of paragraph 11 of the Complaint and allege that while there is no commercial advertising of the professional fees of pharmacists in New York State as a result of Education Law § 6509 and § N.Y.C.R.R. § 63.3 (c), posting of the price of prescription drugs is not only permitted by pharmacists, but mandated by § N.Y.C.R.R. § 63.3 (m) and Education Law § 6826 (set forth in paragraph 5 of the defendants' Answer), effective January 1, 1974, for the purpose of providing information to the public regarding the issues herein involved.

SEVENTH DEFENSE

13. Intervenorers deny each and every allegation of paragraph 12 of the Complaint.

EIGHTH DEFENSE

14. Intervenor deny each and every allegation of paragraph 13 of the Complaint and reallege the grounds set forth in the First Defense herein.

15. Intervenor allege the constitutionality of § 207 of the Education Law of the State of New York and the plenary authority it grants to the Board of Regents of the State of New York and the Commissioner of Education of the State of New York to promulgate rules regulating the professions licensed to practice in New York State.

NINTH DEFENSE

16. Intervenor allege their right under the due process provisions of the Fourteenth Amendment of the United States Constitution to be free of the discriminatory treatment to which plaintiffs seek them to be subjected in that Intervenor allege their right to practice their profession free of commercial advertisement of their professional fees, as are all other licensed professions, including those professions that provide vital and essential services to the public, in the State of New York.

TENTH DEFENSE

17. Intervenor deny each and every allegation of paragraph 14 of the Complaint.

ELEVENTH DEFENSE

18. Intervenor reallege each and every allegation set forth in paragraph 6 of the Defendants' Answer and allege

that plaintiffs, or others similarly situated, are in no way deprived of any information, vital or otherwise, regarding the prices of prescription drugs in the State of New York.

WHEREFORE, Intervenor demand:

1. That the Complaint herein be dismissed;
2. Such other and further relief as to the Court may seem just and proper;
3. An award of costs and disbursements incurred in the defense of this action.

Dated: June 6, 1974.

David Goldberg

DAVID GOLDBERG
Attorney for Intervenor
999 Central Avenue
Woodmere, New York 11598
(516) 374 4694

Louis S. Petrone
Attorney for Service of
papers upon Applicants for
Intervention
106 Memorial Parkway
Utica, New York 13501

AFFIDAVIT OF SAL J. RUBINO IN SUPPORT OF MOTION TO INTERVENE
 UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF NEW YORK

NEW YORK PUBLIC INTEREST RESEARCH GROUP,
 INC. ET AL

Plaintiffs

AFFIDAVIT

against

CIVIL ACTION
 NO. 74-CV-166

THE REGENTS OF THE UNIVERSITY OF THE
 STATE OF NEW YORK, ET AL.,

Defendants

PHARMACEUTICAL SOCIETY OF THE STATE OF
 NEW YORK, INC., MOE GARTNER, LAWRENCE
 BLANK and VINCENT J. MORENO

Applicants for
 Intervention

STATE OF NEW YORK)

SS.:

COUNTY OF)

SAL J. RUBINO, being duly sworn, deposes and says:

1. That he is the Executive Secretary of the
 PHARMACEUTICAL SOCIETY OF THE STATE OF NEW YORK, INC., herein-
 after referred to as the "SOCIETY", and as such is empowered to
 act on its behalf.

2. That deponent is making this affidavit in support
 of the motion of such SOCIETY to intervene in the within action
 as a party defendant.

3. That the purposes of the SOCIETY as prescribed
 by ARTICLE II of its Constitution are as follows:

"The aims of the Society shall be to unite the
 reputable Pharmacists of the State for mutual
 assistance, encouragement and improvement; to
 encourage scientific research; to develop phar-
 maceutical talent; to elevate the standard of
 professional thought; and ultimately to restrict
 the practice of pharmacy to properly qualified
 Pharmacists."

4. That the SOCIETY represents a broad cross-section of registered pharmacists and community pharmacies throughout the State of New York and is looked to by such pharmacists and pharmacies to uphold and advance the ideals of the profession of pharmacy.

5. That a judgment in the within action would directly affect the members of this Society, both professionally and economically. In addition, such a judgment would directly affect the SOCIETY and would impair or impede its ability to uphold and advance the ideals of the profession of pharmacy, for which it was organized.

6. That it is deponent's belief that the existing parties to this action have different interests to protect and therefore different motivations in defending this action, and, thus deponent does not believe that the SOCIETY'S interests can be adequately represented by the existing parties to this action.

WHEREFORE, deponent respectfully requests that the application of the Pharmaceutical Society of the State of New York, Inc., for intervention as a party defendant be granted, and for such other and further relief as this Court may deem just and proper.

HAL J. RUBIN
Executive Secretary
Pharmaceutical Society of
The State Of New York, Inc.

Sworn to before me this
11th day of June, 1974.

DAVID GOLDBERG
NOTARY PUBLIC, State of New York
No. 40-6557950
Qualified in Nassau County
Term Expires March 30, 1976

AFFIDAVIT OF MOE GARTNER IN SUPPORT OF MOTION TO INTERVENE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., ET AL.,

Plaintiffs

AFFIDAVIT

against

THE REGENTS OF THE UNIVERSITY OF THE
STATE OF NEW YORK, ET AL.,

CIVIL ACTION
NO. 74-CV-166

Defendants

PHARMACEUTICAL SOCIETY OF THE STATE OF
NEW YORK, INC., MOE GARTNER, LAWRENCE
BLANK and VINCENT J. MORINO

Applicants for
Intervention

STATE OF NEW YORK)

SS.:)

COUNTY OF *BRONX*)

MOE GARTNER, being duly sworn, deposes and says:

1. That deponent is making this affidavit in support of his motion to intervene in the within action as a party defendant.

2. That deponent is a resident of the State of New York, and has been duly licensed to practice the profession of pharmacy in the State of New York since July 1, 1949, having been issued license number 17592.

3. That deponent is and has been a member of the Pharmaceutical Society of the State of New York, Inc. for approximately fifteen years, has been a member of such Society's Executive Committee for approximately seven (7) years and is such Society's President elect.

4. That deponent is a principal of MAMO PHARMACEUTICALS, INC., d/b/a Medical Arts Pharmacy, 200 East Tremont Avenue, Bronx, New York, and practices the profession of pharmacy at such location.

5. That deponent earns his livelihood from the practice of his profession at said Mamo Pharmaceuticals, Inc., d/b/a Medical Arts Pharmacy.

6. That deponent will be directly affected and bound by the judgment in the within action, both professionally and economically.

7. That a judgment in the within action may very well impair or impede deponent's ability to protect or maintain his interest both as a pharmacist and as a principal of Mamo Pharmaceuticals, Inc.

8. That the livelihood of your deponent is at stake in this matter as is the character of the profession of pharmacy of which he is an active member, as well as the value and importance of the years of schooling that deponent attended and the costs expended in the obtaining of such an education as

is required to practice his profession. Deponent does not believe that such interests can adequately be represented by the existing parties to this action.

WHEREFORE, deponent respectfully requests that his application for intervention as a party defendant be granted, and for such other and further relief as this Court may deem just and proper.

NOE CARTNER

Sworn to before me this

12 day of June, 1974.

ROBERT KESHNER
NOTARY PUBLIC, STATE OF N.Y.
NO. 03-2099750
QUALIFIED IN BRONX COUNTY
COMM. EXPIRES 3/30/75

-2-

AFFIDAVIT OF VINCENT J. MORENO IN SUPPORT OF MOTION TO INTERVENE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., ET AL.,

Plaintiffs

AFFIDAVIT

against

THE REGENTS OF THE UNIVERSITY OF THE
STATE OF NEW YORK, ET AL.,

CIVIL ACTION
NO. 74-CV-166

Defendants

PHARMACEUTICAL SOCIETY OF THE STATE OF
NEW YORK, INC., MOE GARTNER, LAWRENCE
BLANK and VINCENT J. MORENO

Applicants for
Intervention

STATE OF NEW YORK)
COUNTY OF DUTCHESS) ss.:
)

VINCENT J. MORENO, being duly sworn, deposes and says:

1. That deponent is making this affidavit in support of his motion to intervene in the within action as a party defendant.

2. That deponent is a resident of the State of New York, and has been duly licensed to practice the profession of pharmacy in the State of New York since February 21, 1963, having been issued license number 24429.

3. That deponent is a principal of Pawling Pharmacy, Main Street and Maple Boulevard, Pawling New York, and practices the profession of pharmacy at such location.

4. That deponent earns his livelihood from the practice of his profession at said Pawling Pharmacy.

5. That deponent will be directly affected and bound by the judgment in the within action, both professionally and economically.

6. That a judgment in the within action may very well impair or impede deponent's ability to protect or maintain his interest both as a pharmacist and as a principal of Pawling Pharmacy.

7. That the livelihood of your deponent is at stake in this matter as is the character of the profession of pharmacy of which he is an active member, as well as the value and importance of the years of schooling that deponent attended and the costs expended in the obtaining of such an education as is required to practice his profession. Deponent does not believe that such interests can adequately be represented by the existing parties to this action.

WHEREFORE, deponent respectfully requests that his application for intervention as a party defendant be granted, and for such other and further relief as this Court may deem just and proper.

VINCENT J. MORENO

Sworn to before me this

14 day of June, 1974.

ROBERT J. SORACI
NOTARY PUBLIC, N.Y.S.
QUALIFIED IN DUTCHESS COUNTY
REG. 9109235
COMM. EXPIRES 3/30/76

**AFFIDAVIT OF LAWRENCE BLANK IN SUPPORT OF MOTION TO INTERVENE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

**NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., ET AL.,**

Plaintiffs

against

**THE REGENTS OF THE UNIVERSITY OF THE
STATE OF NEW YORK, ET AL.,**

Defendants

**PHARMACEUTICAL SOCIETY OF THE STATE OF
NEW YORK, INC., MOE GARTNER, LAWRENCE
BLANK and VINCENT J. MORENO**

AFFIDAVIT

**CIVIL ACTION
NO. 74-CV-166**

**Applicants for
Intervention**

STATE OF NEW YORK

)

ss.:

COUNTY OF NASSAU

)

LAWRENCE BLANK, being duly sworn, deposes and says:

1. That deponent is making this affidavit in support of his motion to intervene in the within action as a party defendant.

2. That deponent is a resident of the State of New York, and has been duly licensed to practice the profession of pharmacy in the State of New York since March 3, 1961, having been issued license number 23410.

3. That deponent is a member of the Pharmaceutical Society of the State of New York, Inc. and has been a member of such Society's Executive Committee for approximately two (2) years.

4. That deponent is a principal of Gun Hill Pharmacy, Inc., 902A East Gun Hill Road, Bronx County, New York,

and practices the profession of pharmacy at such location.

5. That deponent earns his livelihood from the practice of his profession at said Gun Hill Pharmacy, Inc.

6. That deponent will be directly affected and bound by the judgment in the within action, both professionally and economically.

7. That a judgment in the within action may very well impair or impede deponent's ability to protect or maintain his interest both as a pharmacist and as a principal of Gun Hill Pharmacy, Inc.

8. That the livelihood of your deponent is at stake in this matter as is the character of the profession of pharmacy of which he is an active member, as well as the value and importance of the years of schooling that deponent attended and the costs expended in the obtaining of such an education as is required to practice his profession. Deponent does not believe that such interests can adequately be represented by the existing parties to this action.

WHEREFORE, deponent respectfully requests that his application for intervention as a party defendant be granted, and for such other and further relief as this Court may deem just and proper.

LAWRENCE BLANK

Sworn to before me this
day of June, 1976.

PLAINTIFFS' RESPONSE TO MOTION FOR INTERVENTION
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., et al.,

Plaintiffs,

-against-

THE REGENTS OF THE UNIVERSITY OF THE
STATE OF NEW YORK, et al.,

Defendants.

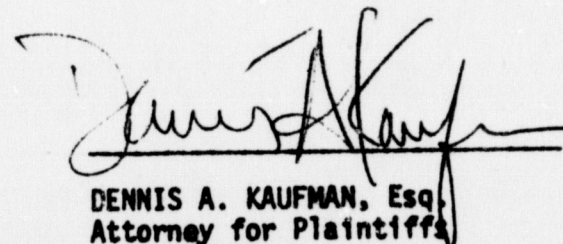
PLAINTIFF'S RESPONSE
TO MOTION FOR
INTERVENTION

CIVIL ACTION
No. 74-CV-166

Plaintiffs oppose, and will argue on the 24th day of June, 1974 before the United States District Court for the Northern District of New York in opposition to the motion to intervene by the Pharmaceutical Society of the State of New York, Inc., Moe Gartner, Lawrence Blank and Vincent Moreno.

The basis of plaintiff's opposition is that applicants for intervention do not meet the requirements set forth in Rule 24 of the Federal Rules of Civil Procedure for either intervention of right or permissive intervention.

Dated: June 17, 1974



DENNIS A. KAUFMAN, Esq.
Attorney for Plaintiffs
29 Elk Street
Albany, New York 12207
(518) 436-0876

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO
INTERVENE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., et al.,

CIVIL ACTION
No. 74-CV-166

Plaintiffs,

-against-

THE REGENTS OF THE UNIVERSITY OF THE
STATE OF NEW YORK, et al.,

Defendants.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
MOTION TO INTERVENE

STATEMENT OF THE CASE

The main action challenges the constitutionality of 8 N.Y.C.R.R. §63.3(c), which prohibits the advertising of fixed fees or prices for professional services of pharmacists, those professional services being the preparing, compounding, preserving or dispensing of drugs, medicines, and therapeutic devices on the basis of prescriptions or other legal authority. The sole effect of this restriction is to prohibit the advertising of prescription drug prices. Section 6509 of the Education Law of the State of New York empowers the defendant Regents of the University of the State of New York to suspend, revoke or annul the license of any pharmacist who engages in such activity.

Plaintiffs contend that 8 N.Y.C.R.R. §63.3(c) is unconstitutional because (1) it denies plaintiffs and others vital

information in violation of the First Amendment, and New York could accomplish its legitimate objectives in protecting the health, safety and welfare of its citizens with laws which do not as seriously infringe on the First Amendment; and (2) there is no rational relationship between the prohibition contained in 8 N.Y.C.R.R. §63.3(c) and the health, safety and welfare of New York citizens, and thus the regulation violates the Due Process Clause of the Fourteenth Amendment.

Plaintiff New York Public Interest Research Group, Inc., (NYPIRG) is a non-profit, non-partisan research and advocacy organization incorporated under the laws of the State of New York with a membership of approximately 60,000, many of whom are users of prescription drugs. Plaintiffs Rosemary Pooler, Barbara Kramer, and Marilyn Ondrasik are residents of the State of New York and regularly purchase prescription drugs. Applicants for intervention are licensed pharmacists in the State of New York and a professional association of pharmacists in the state.

INTRODUCTION

Rule 24 of the Federal Rules of Civil Procedure provides for the requirements and procedure whereby applicants may intervene as parties in an action even though not originally named. Rule 24(a) sets forth the requirements for intervention as of right. Rule 24(b) sets forth the requirements for permissive intervention.

Applicants in their Motion to Intervene as a Defendant delineate grounds for both intervention as of right and permissive intervention although these are not presented in a separate or distinct manner. Plaintiffs contend that applicants for intervention do not meet the specific requirements under either Rule 24(a) or (b) and the Court should deny their motion to intervene as a defendant.

ARGUMENT

I.

APPLICANTS FOR INTERVENTION DO NOT MEET THE
REQUIREMENTS UNDER RULE 24(a) AND
SHOULD NOT BE ALLOWED TO INTERVENE AS OF RIGHT.

A court will not grant an application to intervene in an action as of right unless the applicants demonstrate "(1) an interest in the transaction or property, (2) which the applicant may be impeded in protecting because of the action, and (3) which is not adequately represented by existing parties." Levin v. Mississippi River Corp., 47 F.R.D. 294, 297 (S.D.N.Y. 1969). See also, Rule 24(a)(2) Fed.R.Civ.P.; Nuesse v. Camp, 385 F.2d 694 (D.C.Cir. 1967). Applicants for intervention in the instant case fail to meet any of the above requirements, all of which must be met to intervene as of right.

Neither corporate nor individual applicants demonstrate an interest sufficient to meet the test embodied in Rule 24(a)(2). Courts have consistently held that to intervene as of right under Rule 24(a)(2), applicants must have a "direct, substantial, legally protectable interest in the proceedings." 3-B Moore's

Federal Practice §24.09-1 [2] at 24-301, quoting Judge Wright in Hobson v. Hansen, 44 F.R.D. 18, 24 (D.D.C. 1968). See also, Diaz v. Southern Drilling Corp., 427 F.2d1118 (5th Cir. 1970); Arvida Corp. v. City of Boca Raton, 59 F.R.D. 316 (S.D.Fla. 1973).

In affidavits in support of motion to intervene as a defendant, corporate and individual applicants allege professional and economic interests. (See affidavits of Moe Gartner, Lawrence Blank, Vincent Moreno and Sal Rubino.) The Court should note that if the regulation in the main action were to be declared unconstitutional and the defendant Regents was enjoined from revoking or suspending a license of a pharmacist who advertised the price of prescription drugs, such result would not compel any pharmacist in this state to perform any act, including advertising, nor would such result infringe on the rights of any pharmacist in this state to practice his or her profession in any legal manner he or she saw fit. While the applicants allege economic interests and professional interests, they fail to show the manner in which these interests would be harmed or even affected by the questions in the main action. Arvida Corp. v. City of Boca Raton, supra.

Plaintiffs contend that there is no professional or economic interest of applicants, but rather the overwhelming intent of the regulation at issue in the main action is to protect the citizens of the State of New York. Traditionally, licensure statutes and regulations have been enacted by states to protect the health, safety and welfare of the citizens of the state.

The protected interests herein are those of the public, that is, protection against potential abuses by those holding themselves out as performing services for the public. (This, plaintiffs believe, will be a major contention on the merits in the main action, that is, whether there is a relationship between the effect of the regulation and the health, safety and welfare of the citizens of New York.)

Even if it were to be assumed that the applicants were able to show an interest related to the main action, this interest would not be legally protectable, for applicants lack standing to assert the interest in the main action. "Although the question of standing ordinarily arises where a plaintiff is seeking relief before the Court, an applicant for intervention seeking to interpose a defense to pending litigation must also possess standing to assert that defense." Arvida Corp. v. City of Boca Raton, 59 F.R.D. 316, 321 (S.D.Fla. 1972).

The court in Arvida used the standing test in Flast v. Cohen, 392 U.S. 83, 102 (1968) to determine if an applicant could intervene in a suit challenging a city charter section as unconstitutionally violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The applicant, a city resident, sought to intervene as defendant and thus would have argued for the constitutionality of the charter provision. Relying on the Flast standing test as modified by Sierra Club v. Morton, 405 U.S. 727 (1971), the court required the applicant to "allege facts showing that he himself has a direct and substan-

tial stake in the outcome of the litigation which will be adversely affected." On the instant motion, applicants have merely alleged a general interest because they are pharmacists, and have not demonstrated any facts which show "injury in fact."

The second requirement of Rule 24(a)(2), that an applicant is or may be impeded in protecting his interest, can be easily discharged on the basis of the preceeding analysis and scrutiny of the applicants affidavits. No where do the applicants demonstrate factually that any interest which they possess would be impaired by a judgment rendering 8 N.Y.C.R.R. §63.3(c) unconstitutional. A mere naked allegation that a general interest will be impaired will not suffice.

The final requirement under Rule 24(a)(2) is that the applicant demonstrate that his or her interests are not adequately represented by the existing parties. It should be re-emphasized that if any one of the three requirements is not met, intervention as of right should be denied. Assuming a recognizable interest of the applicant is or may be impaired, if the applicant is unable to establish inadequate representation, the motion here must be denied.

"The controlling rule is that representation is adequate if there is no collusion between the representative and an opposing party, if the representative does not have or represent an interest adverse to the applicant, and if that representative does not fail in the fulfillment of his duty." Stadin v. Union Electric Co., 309 F.2d 912, 912 Cert. denied, 373 U.S. 915 (1972).

Also, absent a showing that the representation may be inadequate, inadequacy will not be presumed. Kheel v. American S.S. Owners Mut. Protection and Indemn. Assn., 45 F.R.D. 281 (S.D.N.Y. 1968). If the applicant and a representative seek the same outcome in the main action, the mere fact that there are slight differences or perspectives in their interest will not show inadequacy of representation. Nuesse v. Camp, 385 F.2d 694 (D.C.Cir. 1967). Nor does mere difference of opinion by attorneys as to the conduct of the case show inadequacy of representation. Stadin v. Union Electric Co., supra.

More specifically, when applicants allege that they are not being adequately represented by the government, in the absence of a showing of bad faith or malfeasance, courts should exercise restraint in holding that the representation is inadequate. Sam Fox Publishing Co. v. United States, 366 U. S. 683, 689 (1961). See also, Moore v. Tangipahoa Parish School Board, 298 F.Supp. 288 (E.D.La. 1969).

Once again the affidavits of applicants only allege that they are inadequately represented by the existing parties. They do not even allege collusion between the representative party (defendant Regents) and the plaintiffs or that the representative has an interest adverse to the applicant or that the representative has failed in the fulfillment of his duty. Both the defendant Regents and applicants desire the same outcome. That is evidenced by an examination of defendant's answer and applicants proposed answer. Analysis will show that defenses raised by both parties are substantially the same, in fact only appli-

cant's Ninth Defense raises a new question. Applicants assert that they have a different motivation to defend. This is far from the bad faith or malfeasance required in Sam Fox. Applicants have failed to meet their burden, however minimal, of demonstrating inadequate representation. Trbovitch v. United Mine Workers, 404 U.S. 528 (1972). Plaintiffs submit that even if applicants do have sufficient interest to meet the first two requirements of the test for intervention under Rule 24(a) (2), they are more than adequately represented by the resources of the State of New York.

II.

APPLICANTS FOR INTERVENTION DO NOT MEET THE
REQUIREMENTS UNDER RULE 24(b) AND SHOULD
NOT BE GRANTED PERMISSIVE INTERVENTION.

Applicants for intervention do not meet the requirements for permissive intervention under Rule 24(b)(2) and this Court should exercise its discretion to deny applicants motion for intervention.

Under Rule 24(b)(2), applicants for intervention must present a question of law or fact in common with the main action. The defects in applicant's motion to intervene as of right illustrate the reasons why permissive intervention should be denied. The Court here should reapply the standing analysis above. It is not possible for an applicant without standing to assert a meritorious claim or defense in this action. Plaintiffs, when selecting the possible defendants in the main action,

could have never sued the applicants and still received the relief requested and necessary to accomplish their valid objectives.

Applicants will undoubtedly raise the issue of construction of Rule 24(b)(2). It is undoubted that this rule should be liberally construed. Peterson v. United States, 41 F.R.D. 131 (D.Minn. 1966). But the rule "should be construed in accordance with its underlying purpose, which is the prevention of a multiplicity of lawsuits involving common questions of law or fact." Hurly v. Van Lare, 365 F.Supp. 186, 196 (S.D.N.Y. 1973). It is obvious that among the plaintiffs, defendants and applicants there will and never can be another lawsuit on the issues in the main action.

Furthermore, scrutiny of the defendants' answer and the applicants proposed answer shows that the defendants have raised all valid defenses which are proposed by the applicants, bar one. That one defense, the Ninth Defense, misconstrues the import of an eventual holding in plaintiffs' favor. Applicants allege that the profession of pharmacy would be denied due process if plaintiffs were to prevail. This argument totally overlooks the fact that if the Court rules 8 N.Y.C.R.R. §63.3(c) is unconstitutional, not one pharmacist in this state would have any right abridged nor would he or she face mandatory advertising. Such advertising would be totally permissive. Since applicants have no new claim or defense, even if they had standing to raise such, their intervention would unnecessarily complicate the litigation and cause undue delay.

CONCLUSION

Since applicants do not show factually that they have met the requirements of Rule 24(a)(2) to intervene as of right, their motion should be denied on that point. Applicants also fail under Rule 24(b)(2) and the Court should exercise its discretion and deny their motion on that point.

DEFENDANTS' RESPONSE TO MOTION FOR INTERVENTION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
NEW YORK PUBLIC INTEREST RESEARCH GROUP,
INC., ET AL.,

Plaintiffs,

-against-

THE REGENTS OF THE UNIVERSITY OF THE STATE
OF NEW YORK, ET AL.,

Defendants.
-----x

Plaintiffs attack the legality of regulations of the Commissioner of Education prohibiting the advertising of the prices of prescription required drugs. Price advertising for prescription required drugs has been prohibited for many years, and similar restrictions prohibit price advertising in the practice of the other professions licensed by the Board of Regents.

The Pharmaceutical Society of the State of New York, and three named pharmacists seek to intervene as parties. Defendants recognize that the interests of individual pharmacists and of the Pharmaceutical Society may significantly differ from the interests of the defendants.

Defendants recognize that this is an issue of great interest and concern to the proposed intervenors, and do not oppose their motion.

Dated: June 17, 1974

ROBERT D. STONE, ESQ.
Attorney for Defendants

s/ Donald O. Meserve
Donald O. Meserve, Esq.
of Counsel
State Education Department
Albany, New York 12224
(518) 474-8869

TRANSCRIPT OF PROCEEDINGS BEFORE HON. EDMUND PORT, J.

HELD ON JUNE 24, 1974

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORKNEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,
et al

Plaintiffs,

-against-

Civil No.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF
NEW YORK, Et al

Defendants

-against-

74-CV-166

PHARMACEUTICAL SOCIETY OF THE STATE OF NEW
YORK, INC., MOE GARTNER, LAWRENCE BLANK and
VINCENT J. MORENO

Defendants

The following proceedings took place at the United
States District Court, Federal Building, Utica, New
York, on the 24th day of June 1974, before HONORABLE
EDMUND PORT, United States District Judge.

APPEARANCES:

DENNIS A. KAUFMAN, ESQ.
ROSEMARY POOLER
Of Counsel
Attorney for Plaintiff

ROBERT D. STONE, ESQ.
DONALD O. MESERVE, ESQ.
Of Counsel
Attorney for Defendant

DAVID GOLDBERG, ESQ.
ALAN I. BOOCKVAR, ESQ.
Of Counsel
Attorney for Defendant

1 THE COURT: All right, as I understand it
2 there are two motions for summary judgment on be-
3 half of the plaintiff?

4 Ms. POOLER: Yes.

5 THE COURT: All right. I don't think I am
6 going to hear any argument on that, I think that
7 is almost self-defeating, isn't it?

8 Ms. POOLER: Well, we also think we are in
9 agreement at least -

10 THE COURT: I would think you would be, for
11 to move for a three judge court and to move for
12 judgment before a single judge is hardly com-
13 patible. So that is off the calendar.

14 Ms. POOLER: Yes.

15 THE COURT: It is dismissed without preju-
16 dice to a renewal before a three judge court, if
17 a three judge court is convened.

18 All right. Now the next motion is to
19 intervene?

20 MR. BOOCKVAR: Good morning, Your Honor.
21 First I would like to thank you for holding this
22 matter until the plane arrived. Thank you Ms.
23 Pooler and Mr. Stone for extending courtesy.

24 Your Honor, this application for inter-
25 vention by the Pharmaceutical Society of the
State of New York and the three individual
pharmacies is, of course, based on Rule 24, and

47a

1
2 I would like to urge upon the Court our con-
3 tention that the intervention that we seek
4 could be granted as of right under Rule 24-A
5 or by permissive intervention, 24-B, and I
6 would like to bring to the Court's attention
7 a particular case cited in 50 FRD 401. It is
8 a 1970 case, General Motors Corporation against
9 Burns et al, an automobile association, as
10 intervenor in a very similar situation as the
11 Pharmaceutical Society wishes to place itself.

12 THE COURT: What was that, some require-
13 ment on automobiles?

14 MR. BOOCKVAR: Yes, certain requirements
15 that were being or hoped to be established in
16 the State of Hawaii, and the Hawaii Automobile
17 Dealers Association and the National Automobile
18 Dealers Association were attempting to intervene.

19 THE COURT: What were the requirements?

20 MR. BOOCKVAR: First, the court does in-
21 dicate, and I will read directly from the citation,
22 that few cases find that a person trying to
23 intervene does not have the required sufficient
24 interest, and in this particular case, a Hawaii
25 dealer has a direct economic interest in pro-
tection -

THE COURT: What was the action?

MR. BOOCKVAR: The actual case was an action

48a

1 by General Motors and a subsidiary wholly
2 owned by it suing the Governor of Hawaii
3 and some other state officials attempting to
4 enjoin as unconstitutional certain parts of
5 what is called the Motor Vehicle Licensing
6 Industry Act.

7 THE COURT: The dealers were going to be
8 licensed?

9 MR. BOOCKVAR: Yes, there are certain
10 licensing requirements and as the Court stated
11 here, the heart of the Act contained a lengthy
12 list of grounds for denying or revoking the
13 license.

14 THE COURT: Of a dealer?

15 MR. BOOCKVAR: With criminal ramifications.

16 THE COURT: So that the intervenors there
17 could have their licenses revoked, could be sub-
18 jected to criminal sanctions, is that correct?

19 MR. BOOCKVAR: And I would like to relate
20 the particular situation of individual pharmacies,
21 that even though their licenses will not be at
22 issue here, the economic effects of their
23 individual pharmacies, as well as the profes-
24 sionalism of the profession of pharmacy is at
25 stake, and while it is not on all fours, it is a
similar relationship, their livelihood is at
stake here.

THE COURT: Their livelihood is at stake if

49a

1 you assume that this statute, regulation, or
2 whatever it is, is found to be unconstitutional,
3 that it is going to affect their economic return?

4 MR. BOOCKVAR: Yes, Your Honor.

5 THE COURT: But of course I am not an
6 economist, the additional competition could well
7 increase their return, I don't know.

8 MR. BOOCKVAR: Well, I think that is a
9 point which would be heard in the matter itself.

10 THE COURT: That is what the legislature
11 is for.

12 MR. BOOCKVAR: I think the key is whether
13 the economics go one way or another, they do have
14 that economic interest in the outcome of the
15 current litigation, and I think that is the
16 point of their direct economic interest, whether
17 they are correct in assuming whether they are
18 going to gain or lose with the statute, -

19 THE COURT: Although this isn't directed
20 toward - well, it is, from the consumer, from
21 the plaintiffs they are directing it toward
22 them.

23 MR. BOOCKVAR: Yes. Going further here,
24 Your Honor, in this particular case, the Hawaii
25 Automobile Dealers Association represented the
26 Hawaii automobile dealers in attempting to protect
27 their benefits in a variety of ways, and I think
28 the affidavit of Mr. Rubino, who was the execu-

50a

1 tive secretary of the Pharmaceutical Society,
2 indicates a similar relationship with the
3 Society.

4 THE COURT: Well, if the Pharmaceutical
5 Society is in the posture of a plaintiff here,
6 I don't think there would be much problem, the
7 key is that they are not attaching, they are
8 asking to maintain, and what they are seeking
9 to maintain is a limitation on advertising that
10 has been imposed by the Board of Regents, the
11 body that is charged with the responsibility of
12 controlling the provision, so the whole thing
13 revolves, it is down to the duty of controlling
14 a provision, and of course the individual phar-
15 macists, as the individual professional of any
16 kind might or might not, as I have indicated,
17 have the same interest or viewpoint as the body
18 charged with protecting it, but they don't have
19 the duty either.

20 Let me hear - I know what your point is,
21 it has been succinctly stated, it is that they
22 have a professional and economic interest in up-
23 holding the hand of the Regents here.

24 MR. BOOCKVAR: Yes, I kind of look at this,
25 maybe because it is easier to relate to, a
 bar association, if the same litigation were
 commenced against attorneys and their regulations
 and prohibitions for advertising, and as an

51a

1 attorney I would probably look to the State
2 Bar Association for assistance in protecting
3 an interest that I would have, and I put the
4 Pharmaceutical Society in the same position as
5 regards the pharmacists who have gone to school
6 to obtain their degree.

7 THE COURT: That is nobly put, probably
8 too nobly for the lawyers.

9 MR. BOOCKVAR: Thank you, Your Honor.

10 THE COURT: I think the Appellate
11 Division of the State of New York recently took
12 off after the way we charged fees and surrogate
13 m s but I think we can espouse some noble
14 thoughts in that direction.

15 What about the Regents, what is the
16 position of the Regents here?

17 MR. MESERVE: We are neutral on this
18 motion, Your Honor. I would just comment that
19 we are really in a position of a middle man,
20 that the plaintiffs here -

21 THE COURT: No, you are not in the position
22 of a middle man, don't view yourself as such.
23 You have got a duty here.

24 MR. MESERVE: Yes, but the position of
25 the Regents with respect to the practice of
pharmacy is between is between the position of
the consumer advocates on the one side and the
position of the professional organizations on

52a

1 the other. To that extent we view ourselves
2 as operating in the public interest, as in-
3 dicated by the legislature, and I would feel
4 that the plaintiffs here are saying in effect
5 that it is a violation of their constitutional
6 rights that pharmacies can't advertise. They
7 are really a third party plaintiff in that they
8 are urging that somebody else has the right to
9 do something, the pharmacies, the pharmaceutical
10 association is seeking to intervene on a matter
11 which does go to the heart of the practice of
12 the profession. I wouldn't think it is solely
13 economic there. We do not oppose the motion.

14 THE COURT: All right.

15 MS. POOLER: May it please the Court -

16 THE COURT: I am not hearing you on sum-
17 mary judgment, that is a foolish motion.

18 MS. POOLER: Well, I will accept that.

19 I would like to distinguish the General
20 Motors case, the Hawaiian case, and I would like
21 to quote again as Mr. Boockvar did, from the
22 Court, where it says here - a Hawaiian dealer
23 has a direct economic interest in preserving the
24 protection that the Act gives him. I think it is
25 very important for us all to know that that Act
prohibiting advertising is not to protect the
pharmacies but to protect the public, to protect
the health, safety against patent medicines,

✓ *

1 against unprofessional practices of the pro-
2 fessional pharmacies, so the pharmacies have
3 no special interest in preserving this because
4 it wasn't designed to protect their livelihood. NO!

5 THE COURT: I suppose you can't divorce
6 the livelihood of the profession from the wel-
7 fare of the public. If you impoverish a group
8 of professionals and impoverish the service the
9 public is going to receive, I don't know how far
10 this professional service extends, all the medi-
11 cations that I get, unfortunately they are too
12 numerous, are counted and none of them are
13 poured, they are all counted, but that is not for
14 the Court to decide. There are areas in which
15 pharmacists are called into being and are quite
16 necessary, it seems it wouldn't require the
17 schooling that is required if there weren't sub-
18 stantial skills required, so we can't say the
19 legislature or the Regents can divorce the
20 economics.

21 MS. POOLER: Yes, the economics of the
22 matter, of course, go much more to the merits of
23 the main action.

24 I would also like to take a moment to dis-
25 tinguish, if I can, pharmacists from attorneys.

THE COURT: Well -

MS. POOLER: As mentioned by Attorney
Boockvar. Pharmacists, indeed, are professionals,

54a

1 but there is an essentially retail nature in what
2 they do which differs substantially, I think,
3 from the -

4 THE COURT: You mean we are not allowed
5 to sell toasters?

6 MS. POOLER: It is quite different, the
7 retail nature of pharmacists **makes** it different
8 from the practice of law. In addition we have
9 found and the Federal Trade Commission has found
10 and several State courts have found greater
11 variation in the prices of identical retail goods
12 as sold by the pharmacists, and as far as I know
13 among all the things that lawyers have been
14 charged with, no one has charged them with tre-
15 mendous variations in fees, probably because it
16 is hard for lawyers to turn out products that
17 are identical, but with pharmacists it is an
18 important distinction. We think the Pharma-
19 ceutical Society does not meet any of the tests
20 of 24-A or B.

21 THE COURT: What about the Pharmaceutical
22 Society's intervening here, that is what is be-
23 fore me now?

24 MS. POOLER: We are opposed to it, because
25 we simply think they don't meet the test as
enunciated in 24-A and B.

They allege professional and economic in-
terest, but they fail to show in their affidavits,

55a

1 the individual pharmacist, how these alleged
2 interests would be harmed or even affected by
3 the questions in the main action. If advertising
4 were held to be constitutional, if the regulation
5 in question was overthrown, no one would be
6 forced, of course, to advertise, no basic rights
7 would be infringed, it is totally permissive, and
8 I think that that gets at this legally protected
9 interest.

10 The intent of this regulation, as we said
11 before, is to protect the citizens of the State
12 of New York, not the pharmacists. ✓

13 THE COURT: Well, the plaintiffs objection
14 here is addressed to First Amendment objections.

15 MS. POOLER: First and Fourteenth, yes.

16 THE COURT: The plaintiffs are complaining,
17 because as I get it, that the news is being kept
18 from us, we are not being told, we are not being
19 permitted to be told of the price of drugs, that
20 it is not because it is a secret, but because
21 they post it in drug stores but for other rea-
22 sons which we don't think are valid, that is the
23 crux of the case, isn't it?

24 MS. POOLER: Yes, we also have due process
25 objections, we don't think that -

THE COURT: Where does due process come in?

MS. POOLER: We don't think the regulation

56a

1 of prohibiting advertising really goes to the
2 health, safety, and we think it is like hitting
3 a flea with a cannon ball in order to protect
4 the public from patent medicine to prohibit ad-
5 vertising of whatever product.

6 THE COURT: Well, due process would re-
7 quire what, a rational connection ?

8 MS. POOLER: Exactly, and we think there
9 is no rational connection.

10 THE COURT: Well, here is what I am going
11 to do. It is quite obvious that I have looked
12 at these papers at least tentatively, have
13 formulated some kind of tentative position
14 which hasn't been changed by the argument here.
15 I think that the Regents' position here is being
16 attacked as a restriction on First Amendment
17 rights. I think that the State of New York,
18 the Regents have the burden of sustaining that
19 position as a legislative bureaucratic pro-
20 cedure properly undertaken. The Pharmaceutical
21 Society and the individual pharmacists, I think
22 are representing a more parochial viewpoint,
23 that is demonstrated indirectly at least by the
24 fact that while the plaintiffs don't appear to
25 be joined by pharmacists, the pressure of the
professional society and professionalism they
are or they have submitted as part of the
papers an affidavit from a pharmaceutical retail

57a

1 outlet which indicates approval of their posi-
2 tion, so that I think a poll that would be
3 taken, those that feel they would profit from
4 advertising would probably be for it, and those
5 that feel that they would not profit from ad-
6 vertising would be for the regulation, the
7 others would be opposed. I am looking at it
8 very pragmatically. I think these fellows in the
9 drug stores are not much different than the rest
10 of us, I am sure there are some fine men and good
11 samaritans among them that put the public wel-
12 fare above their own good, but I doubt that
13 they don't have the division I have just in-
14 dicated.

15 However, I think that the fairer solution
16 would be to do as is often done in environmental
17 cases. They have a big money stake. While I
18 don't feel that they are probably properly there
19 as intervenors, additional pleadings and addi-
20 tional problems, I do feel they can help the
21 Court and are willing to help the Court, their
22 assistance is welcome, accordingly the inter-
23 venors, the petition to intervene, the motion
24 for leave to intervene is denied. Please com-
25 pile briefs at all stages of the proceeding
as amicus curiae are granted to the proposed
intervenors.

All papers should be served on the counsel,

58a

1] Mr. Boockvar, or his firm.

2 Now no one has tapped what is troubling
3 me here, that is, this is advertising. I have
4 been unable to find in a quick search Friday,
5 with the assistance of two law clerks, I have
6 been unable to find a direct case, but I am
7 aware that ordinarily advertising material is
8 not afforded First Amendment protection.

9 Now the cases don't come up in this con-
10 text, they come up in a different context, but I
11 wish somebody would give me some information,
12 give me some facts.

13 Now in supplying me and in seeking out
14 that, that of course would go to whether or
15 not I have got a substantial constitutional
16 question, and I think we were all in court when
17 I quoted from Goosby against Osser as to what
18 the Supreme Court has indicated is a substantial
19 question, a measurement of a substantial ques-
20 tion for the District Court to apply. They
21 said a claim is insubstantial only if its un-
22 soundness so clearly results from the previous
23 decisions of this Court as to foreclose the
24 subject matter and leave no room for the in-
25 ference that the question sought to be raised
can be the subject of controversy.

 Now if somebody can supply me with a case
that brings it within this definition of in-

59a

1 substantiality,, of course I would be re-
2 quired to dismiss, otherwise I think there is
3 a substantial question and I would be required
4 to ask for the convention of a three judge court,
5 in which event I don't think any of you counsel
6 appeared in three judge courts before this Court
7 before, so in the event that a three judge court
8 is convened, I can tell you what the procedure is.
9 Very briefly, I request the Chief Judge to con-
10 vene a three judge court. Ordinarily, Judge
11 Foley, the other District Judge and myself would
12 be the two District Judges. A Court of Appeals
13 Judge would be assigned by the Chief Judge. I
14 will prepare a schedule of briefings for a
15 hearing. Now in a case such as this there
16 wouldn't be any factual issues, it is all a mat-
17 ter of record, so the briefings and arguments and
18 motions and cross motions for summary judgment
19 will be disposed of, assuming there is a three
20 judge court.

21 Keep in mind the restrictions on the Dis-
22 trict Court. I am bound by Goosby against Osser,
23 and give me if you can any support for your re-
24 spective positions.

25 How long do you want for that?

MS. POOLER: We could be ready for it -

THE COURT: I just want the memo.

MS. POOLER: On the three judge panel?

60a

1 THE COURT: Yes, whether a three judge
2 court should be convened, substantiality.

3 MS. POOLER: Two weeks, I don't think
4 we need more than that.

5 MR. BOOCKVAR: I think I would have to ask
6 the Court for a substantially longer period of
7 time, four or five weeks.

8 THE COURT: This is a long range problem,
9 I guess the statute has been around for a long
10 time.

11 MR. BOOCKVAR: Even if we could get it
12 into some time in August I would appreciate it.
13 You are not contemplating oral arguments?

14 THE COURT: I just want the memoranda,
15 because my problem is quite a limited problem,
16 as I see it at least, unless somebody shows me
17 to the contrary. Today is June 24, it seems to
18 me that July 22 ought to be ample time, that is
19 five weeks.

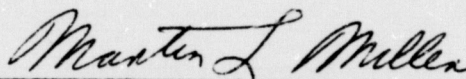
20 MR. MESERVE: Papers only on the question
21 of the substantiality?

22 THE COURT: That's all. I don't think I
23 have any other questions that I left.
24
25

61a

R E P O R T E R ' S C E R T I F I C A T I O N

I, MARTIN L. MILLER, Official Court
Reporter for the United States District Court in
and for the Northern District of New York, do
certify the foregoing to be a true and accurate
transcription of the stenographic notes as taken
me by during the aforesaid proceedings.



Official Court Reporter
U. S. District Court
Northern District of New York

62a
ORDER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW YORK PUBLIC RESEARCH
GROUP, INC., et al.,

Plaintiffs

against

THE REGENTS OF THE UNIVERSITY
OF THE STATE OF NEW YORK, et al.,

Defendants

O R D E R

CIVIL ACTION
No. 74-CV-166

This cause having been heard on the 24th day of June, 1974, on the motion of the PHARMACEUTICAL SOCIETY OF THE STATE OF NEW YORK, INC., MOE GARTNER, LAWRENCE BLANK, and VINCENT J. MORENO, for leave to intervene as party defendants in this action, and the court having heard argument of counsel and upon consideration thereof, and there being no just reason for delay, it is hereby

ORDERED, that the motion be and the same hereby is in all respects denied as to all moving parties, and it is further

ORDERED, that all moving parties are hereby granted leave to participate in all aspects of this matter as amicus curiae, and it is further

ORDERED, that as amicus curiae, all moving parties may submit briefs when necessary, serve copies of same upon all parties to this action, and it is further

ORDERED, that all parties to this action are required to serve copies of all pleadings, briefs, and other legal documents in this action upon the attorney for the moving parties,

Dated: *July 31*, 1974

S/ EP
UNITED STATES DISTRICT JUDGE

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW YORK PUBLIC INTEREST
RESEARCH GROUP, INC., et al

Plaintiffs

CIVIL ACTION

No. 74-CV-166

against

THE REGENTS OF THE UNIVERSITY OF
THE STATE OF NEW YORK, et al.

Defendants

PHARMACEUTICAL SOCIETY OF THE STATE
OF NEW YORK, INC., MOE GARTNER,
LAWRENCE BLANK and VINCENT J. MORENO

Applicants for
Intervention

NOTICE OF APPEAL

Notice is hereby given that the Pharmaceutical Society of the State of New York, Inc., a corporation, MOE GARTNER, LAWRENCE BLANK and VINCENT J. MORENO, above named as Applicants for Intervention, hereby appeal to the United States Court of Appeals for the Second Circuit from the order of Hon. EDMUND PORT, United States District Judge of the Northern District of New York, dated and entered in this action on July 31, 1974, denying the motion of such Applicants for Intervention to intervene as party defendants in the within action.

August 20, 1974

DAVID GOLDBERG
Attorney for Applicants
for Intervention
999 Central Avenue,
Woodmere, N.Y. 11598
(516) 374-4694

US COURT OF APPEALS: SECOND CIRCUIT

NEW YORK PUBLIC INTEREST
RESEARCH GROUP,
Plaintiffs-Appellees

against

REGENTS OF THE UNIVERSITY OF THE
STATE OF NEW YORK,
Defendants-Appellees

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Karen Giles,

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
1013 East 180th Street, Bronx, New York

That upon the 21st day of Oct 1974, deponent served the annexed *Appendix*

upon

attorney(s) for

in this action, at *

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 21st
day of Oct 1974

Karen Giles

Print name beneath signature

KAREN GILES

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0415000
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

* Dennis A Kaufman & Rosemarie Pooler
29 Elk Street- Albany, New York 12207

* Robert D. Stone & Donald O Meserve
New York State Education Department
Education Building
Albany, New York 12224